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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920

No. 925. 136

THE WESTERN PACIFIC RAILROAD COMPANY, APPELLANT,

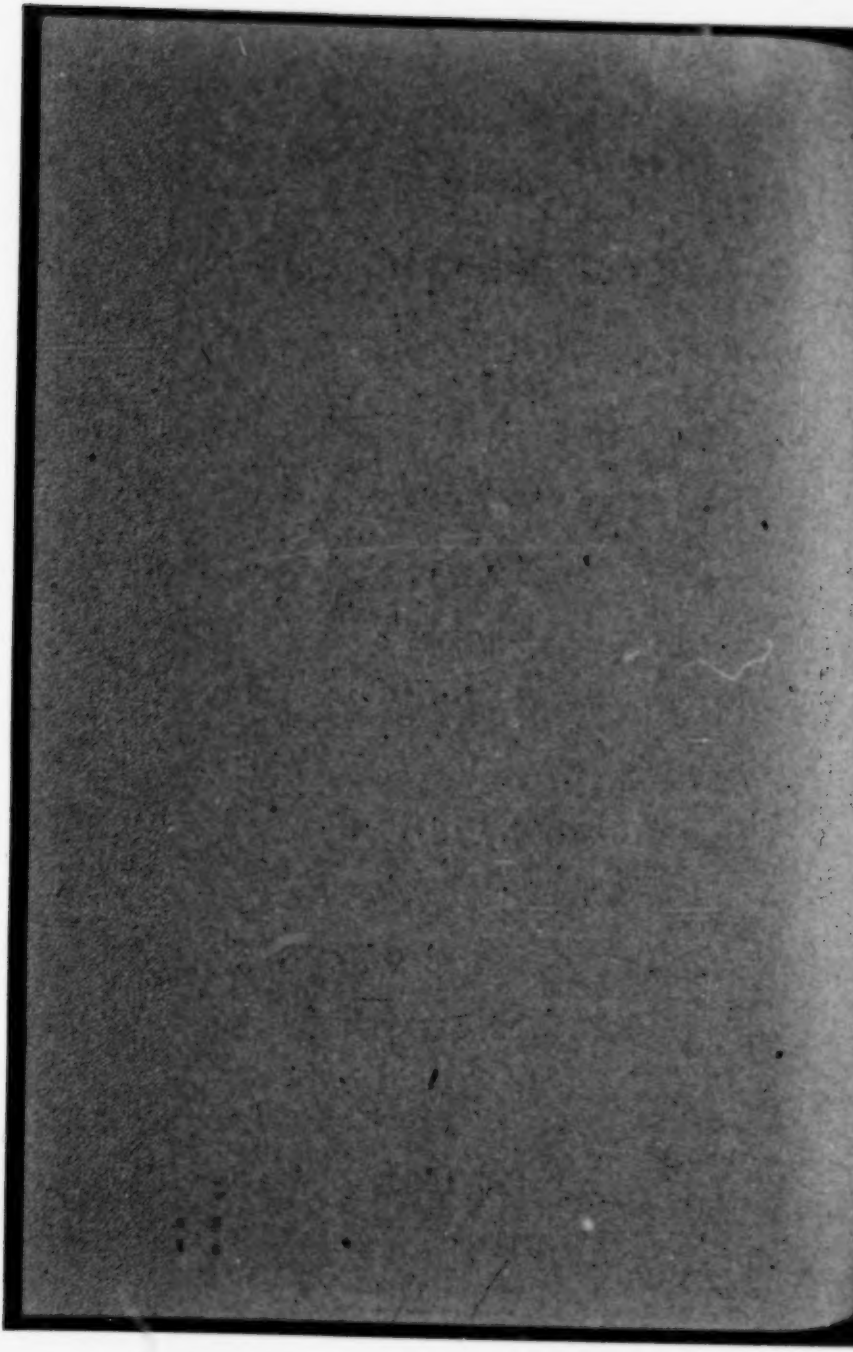
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 2, 1920.

(27,190)



# (27,190)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1919.**

# No. 435.

THE WESTERN PACIFIC RAILROAD COMPANY, APPELLANT,

*vs.*

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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In the Court of Claims.

No. 33678.

THE WESTERN PACIFIC RAILROAD COMPANY

vs.

THE UNITED STATES.

I. *Petition and Amended Petition.*

On October 31, 1916, the claimant filed its original petition. Subsequently, to wit, on September 25, 1918, by leave of court, the claimant filed its amended petition which is as follows:

To the Honorable Chief Justice and Judges of the Court of Claims:

The amended petition of The Western Pacific Railroad Company respectfully represents:

I.

The petitioner, The Western Pacific Railroad Company, is a corporation duly organized and existing under the laws of the State of California, duly empowered to operate railways in the States of California, Nevada and Utah.

II.

In or about the year 1910 the Western Pacific Railway Company completed the construction of and thereafter operated a
2 system of Railways in the States of California, Nevada and Utah.

III.

Pursuant to a decree of the District Court of the United States for the Northern District of California, entered on May 27, 1916, in a certain cause there pending entitled Equity No. 169, The Equitable Trust Company of New York, as trustee, complainant, against the said Western Pacific Railway Company and others, and pursuant to a master's sale as therein directed and afterwards approved by the court, the petitioner, by deed of Francis Krull, Special Master, and others, dated July 1, 1916, acquired all of the railways, property, assets and choses in action belonging to the said Western Pacific Railway Company or to Frank G. Drum and Warren Olney, Jr., as receivers of the said Western Pacific Railway Company appointed in said cause and in a certain cause ancillary thereto pending in the District Court of the United States for the District of Utah, who, as such receivers, operated the railway properties of said Western Pacific

Railway Company during the period from March 3, 1915, in the one case, and March 6, 1915, in the other, until July 14, 1916, when the said receivers turned over to the petitioner the railways, property and assets of said Western Pacific Railway Company, since which time the petitioner has operated the said railways; and hereinafter in the paragraphs relating to transportation and settlements therefor, the term "claimant" is, for convenience, used to designate the said Western Pacific Railway Company, the said receivers, or the petitioner herein, as the case may be.

IV.

Under the acts by which lands were granted in aid of the construction of railroads and subsequent legislation of Congress, the rates for the transportation of government troops and property on land-grant railroads during the times hereinafter mentioned were fifty per centum of the rates for transportation of similar character for private account; but the provisions in the said acts granting lands in aid of the construction of railroads and reserving special privileges to the United States in respect of the use of such railroads, were limited to the transportation of property and troops of the United States.

V.

Heretofore and before the transactions hereinafter mentioned, railroad companies of the United States generally, including the said Western Pacific Railway Company, severally agreed with the Quartermaster General of the United States Army that they would each accept

"for the transportation of property moved by the Quartermaster Corps, United States Army, and for which the United States government is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement,"

which said agreements, known as "equalization agreements," are set out in Circular No. 23, Quartermaster General's Office, 1911, dated November 15, 1911, and Circular No. 6, Office of the Chief, Quartermaster Corps, 1913, dated March 1, 1913. By virtue of such agreements the rates for shipments covered thereby were fixed by the published tariff rates by way of the practicable route between the terminal points of the movement affording the largest proportion of land-grant mileage less proper land-grant deduction applicable to such land-grant mileage involved.

VI.

By Circular approved by the Secretary of the Treasury under date of October 29, 1917, and printed in 14 Decisions of the Comp-

troller of the Treasury, at pages 967 et seq., a form of bill of lading was prescribed for freight shipments by the United States, on the back of which appeared, among others, the following conditions and instructions:

"Conditions.

"It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

1. Prepayment of freight charges will in no case be demanded by carriers. Upon surrender of this bill of lading duly accomplished payment will be made to the last carrier, except where otherwise specifically stipulated.

2. For railway transportation this bill of lading is subject to all the conditions of the uniform or standard bills of lading, and for express shipments to all the conditions contained in the standard form of receipt issued by express companies, except as otherwise specifically provided hereon.

3. Shipments made upon this bill of lading shall take the rate provided for shipments made upon the uniform or standard bills of lading or standard receipts. * * *

"Instructions.

1. Government property will be transported on the prescribed form of Government Bill of Lading, which will be identified by serial numbers.

* * * * * * *

3. When shipments are made under contract or special rates, notation of such fact should appear on the face of the bill of lading.

4. Officers charged with the duty of providing or securing Government transportation should familiarize themselves with land-grant railroads in order that shipments may be made at the lowest rates available to the government by the use of such lines, or lines equalizing rates therewith.

* * * * * * *

7. Public property may be delivered by any Government officer or agent to the Quartermaster's Department of the Army, which will ship the same under its regulations. (23 Stat. 111.)

8. Only one copy of a bill of lading will be issued for a single shipment. This bill, when receipted by the agent of the receiving carrier, will be returned to the consignor and by him mailed to the consignee, who will, upon receipt of the shipment, accomplish and surrender the bill to the last carrier. This bill then becomes the evidence upon which settlement for the service will be made. * * *"

The said conditions being accepted by the railroad companies, the latter thereby waived their right either to payment of the freight charge before shipment or before delivery at destination, and after delivery of the shipment the freight charge became a claim against the United States the amount of which was fixed and determined by the published and standard rates for shipments made upon the uniform or standard bills of lading or standard receipts, subject only to proper deduction, if any, for land-grant mileage in accordance with the laws of the United States and said equalization agreements.

## VII.

The said Circular of October 29, 1907, also prescribed forms of so-called "Public Voucher for Transportation of Freight," one for cases not involving land-grant mileage and one for cases involving land-grant mileage, the latter of which provided columns for entry of Class Symbol, Bill of Lading date and number, Initial
6 point of shipment and destination, Mileage, total and land-grant, Class or Commodity, Weight, Rate, Gross Amount, Amount to be deducted on account of land-grant, and Amount Claimed, and required the following certificate:

"I certify that the above account is correct and just; that the services have been rendered as stated; that payment therefor has not been received, and that the rates charged are not in excess of the lowest net rates available for the government, based on tariffs effective at the date of service.

_____,
*(Name of Transportation Company).*
Per _____,
*(Name and Capacity.)*"

And upon the back of the form of so-called voucher, appeared the following, among other, instructions:

"3. Payment for transportation of freight will be made to the last carrier, unless otherwise provided in the bill of lading, upon the voucher form accompanied by the corresponding accomplished bills of lading," etc.

As, however, the amount of the freight charge was, as aforesaid, fixed by published tariffs subject to proper land-grant deduction, if any, and the accomplished bills of lading were made the evidence upon which settlement was to be made, and such rates or charges so fixed were not subject to the direction or control of the accounting officers of the government or of the last carrier's auditors or agents certifying such so-called voucher, such vouchers were, and, as a matter of long-established custom and practice, were regarded by the government disbursing and accounting officers, as merely tentative and subject to revision or correction by such disbursing and accounting officers, whether such revision or correction involved increase or decrease in the amount stated in such so-called vouchers.

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## VIII.

Under the regulations of the United States Army in force at the times hereinafter mentioned, each and every officer of the Army, when changing station, was entitled to the transportation, at the expense of the government, of a certain weight of household goods or other personal property belonging to him, such weight being graded by his rank; and army officers, when proceeding to or changing station, were entitled to transportation, at the expense of the government, of the number of private mounts (horses owned by them) for which they were entitled to forage according to their rank.

## IX.

The Comptroller of the Treasury by decision of February 26, 1886 (2 Comp. Dec. 415), held generally that the United States was entitled to land-grant rates on such transportation as it might require of land-grant railroads. By decision of October 13, 1904 (11 Comp. Dec. 174), the Comptroller of the Treasury held that the certain fixed amount of effects of officers, known as change of station allowance, authorized to be transported by the government at its expense, became invested with a quasi-public character and, as such, the railroads were under obligation to transport it on the same terms as other government property, but that the railroads were entitled to full rates on weight of such effects in excess of the change of station allowance. And by decision of October 16, 1905 (12 Comp. Dec. 202), the Comptroller of the Treasury held that a regulation of a Secretary of a Department authorizing the transportation at public expense of certain articles or a certain quantity of personal belong-

8 ings, constituted those articles government property for the purpose of transportation, and that the same should be shipped as government property on government bill of lading and at government (land-grant) rates. Thereafter, upon request by the War Department for a ruling as to whether, in view of the act of Congress of March 3, 1910 (authorizing baggage in excess of the regulation change of station allowance to be shipped with such allowance and reimbursement for transportation charges on such excess to be collected from the officer), the Comptroller of the Treasury on December 20, 1910, rendered a decision (17 Comp. Dec. 428) wherein he held that by virtue of said act of March 3, 1910, excess baggage or effects, as well as the regulation change of station allowance, became invested with a quasi-public character and as such should be transported by carriers as other government property. But thereafter, under date of February 21, 1914, the Comptroller of the Treasury rendered a decision (20 Comp. Dec. 575) wherein, after reiterating his prior uniform rulings that transportation of an officer's baggage and effects, to the extent of the regulation change of station allowance, was subject to land-grant deduction, he held that any excess could not be regarded as government property and the railroads could not be required to transport it as such, but declared and di-

rected that said decision should not be applied to the readjustment of accounts theretofore adjusted in accordance with his decision of December 20, 1910, supra. Thereafter this court, on February 8, 1915, handed down its decision in the case of the Chicago, Milwaukee and St. Paul Railway Company vs. The United States, holding that an officer's baggage or effects are not property of the United States within the meaning of the railroad land-grant legislation and that the railroads are entitled to full commercial rates on such shipments. But thereafter, by decision of June 30, 1915 (21 Comp. Dec. 889), the Comptroller of the Treasury held, notwithstanding said
9 decision of this court, that the annual acts of Congress making appropriation for the transportation of the army and its supplies, limited the authority of the government accounting and disbursing officers, in settlements for the transportation of officers' baggage and effects within the regulation change of station allowances and involving land-grant mileage, to payment of the rate applicable to proper government transportation; and by a further decision of December 14, 1915 (22 Comp. Dec. 263), adhered to said decision of June 30, 1915.

X.

Between the 10th day of June, 1919, and the 18th day of March, 1915, the claimant, at the request of the United States as shipper or consignor, received from other railroad companies at connecting points, on government bills of lading, and transported over its lines aforesaid, effects and property of various officers of the United States army, as to all of which, had the same been property of the United States, land-grant deductions under the said equalization agreements would have been proper; but the said effects and property not being property of the United States, the claimant, as the last or delivering carrier, was entitled to payment for all of such transportation at the regular published tariff rates applicable, nevertheless the said decisions of the Comptroller of the Treasury, being binding upon the Executive branch of the government, precluded the claimant from securing from the government disbursing or accounting officers payment beyond the amounts payable under said decisions on account thereof.

XI.

The claimant's auditor or agent presented to the proper disbursing officer of the Quartermaster Corps of the United States
10 Army station at San Francisco, California, the accomplished bill of lading for the first of said shipments accompanied by a so-called voucher upon one of said government forms wherein the full published tariff rate or charge applicable was stated as the amount due, but the said decisions of the Comptroller of the Treasury theretofore rendered, being binding upon the Executive branch of the government and precluding the said disbursing officer from making payment for said transportation beyond the amount payable therefor under said decisions, such disbursing officer refused to make

payment of the full amount of said charge and required the making of a revised voucher showing land-grant deduction in accordance with said decisions, and thereupon, in order for the claimant to receive payment to the extent to which, under said decisions, the said disbursing officer could make settlement, and without in any wise waiving or releasing the government from liability for, or intending to waive or release the government from liability for, the full tariff rate or charge applicable to such shipment, the claimant's said auditor or agent (who was without authority or power to waive or release the government from liability for such full tariff rate and charge) prepared and delivered to said disbursing officer such a revised so-called voucher in form and content as directed by said disbursing officer, wherein was stated the net amount payable by such disbursing officer after deduction on account of land-grant mileage involved, as required by said decisions, and thereupon the claimant received from said disbursing officer payment of said net amount.

## XII.

Thereafter as the accomplished bills of lading for such shipments were submitted to said disbursing officer and in order for the
11 claimant to receive payment to the extent to which under the said decisions of the Comptroller of the Treasury as rendered from time to time the said disbursing officer could make settlement, and without in any wise waiving or releasing the government from liability for, or intending to waive or release the government from liability for the full tariff rates and charges applicable to such shipments, the claimant's said auditor or agent (who was as aforesaid without authority or power to waive or release the government from liability for any part of such full tariff rates and charges), after conference with said disbursing officer in each instance, prepared and delivered to said disbursing officer such so-called vouchers in form and content as directed by said disbursing officer, wherein were stated the net amounts payable by such disbursing officer after deduction on account of land-grant mileage involved, as required by said decisions, and thereupon the claimant received payments of said net amounts. And the amounts so deducted and withheld on all of said shipments mentioned in paragraph X hereof, amounting in the aggregate to $5,760.89, still remain due and unpaid.

## XIII.

Between the 18th day of March, 1915, and the 1st day of August, 1916, the claimant, at the request of the United States as shipper or consignor, received from other railroad companies at connecting points, on government bills of lading, and transported over its lines aforesaid, effects and property of various officers of the United States Army, as to all of which, had the same been property of the United States, land-grant deductions under the said equalization agreements would have been proper; but the said effects and property not being property of the United States, the claimant, as the last or delivering

carrier, was entitled to payment for all of such transportation
12 at the regular published tariff rates applicable, nevertheless the government disbursing and accounting officers allowed and issued warrants for net amounts after making land-grant deductions on account of land-grant mileage involved, although the claimant's auditor or agent, being then advised of the decision of this court in the case of the Chicago, Milwaukee and St. Paul Railway Company, submitted in each of such cases a so-called voucher wherein the full published tariff rate and charge was stated as the amount due and payable, and such warrants were by the claimant accepted under protest. And the amounts so deducted and withheld on all of said shipments mentioned in this paragraph, amounting in the aggregate to $851.78, still remain due and unpaid.

## XIV.

By reason of all such withholding of amounts as land grant deductions, the said Western Pacific Railway Company, the said receivers thereof, and the petitioner herein were paid $6,612.67 less than they would have received had they been paid for all said transportation at the full published tariff rates and charges.

Wherefore, the petitioner, as successor in interest as aforesaid of the said Western Pacific Railway Company and the said receivers thereof, and in its own right, demands judgment of the United States in the sum of $6,612.67, no part thereof having been paid, and the right thereto of the said Western Pacific Railway Company and the said receivers thereof not having been assigned otherwise than by operation of the judicial proceedings aforesaid, and the right of the petitioner thereto not having been assigned.

THE WESTERN PACIFIC RAILROAD COMPANY,
By CLARK, PRENTISS & CLARK,
*Its Attorneys.*

13 STATE OF CALIFORNIA,
*City and County of San Francisco, ss:*

J. F. Evans, being duly sworn, deposes and says that he is General Auditor of The Western Pacific Railroad Company, the petitioner in the foregoing and annexed petition; that he has read the said petition and that the matters stated therein are true to the best of his information and belief.

J. F. EVANS.

Subscribed and sworn to before me this third day of September, 1918.

[SEAL.] FLORA HALL,
*Notary Public in and for the City and County of San Francisco, State of California.*

II. *General Traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On April 1, 1919, this case was submitted on merits by Mr. W. C. Prentiss, for the claimant, and Mr. H. C. Whitman, for the defendants, on arguments made this day by the same counsel in the case of Denver & Rio Grande R. R. Co., No. 33,301.

14 IV. *Findings of Fact (as Amended June 28, 1919) and Conclusion of Law, Entered May 5, 1919.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

*Findings of Fact.*

I.

The plaintiff, The Western Pacific Railroad Company, is a corporation duly organized and existing under the laws of the State of California, duly empowered to operate railways in the States of California, Nevada, and Utah.

II.

In or about the year 1910 the Western Pacific Railway Company completed the construction of and thereafter operated a system of railways in the States of California, Nevada, and Utah.

III.

Pursuant to a decree of the District Court of the United States for the Northern District of California, entered on May 27, 1916, in a certain cause there pending, entitled Equity No. 169, The Equitable Trust Company of New York, as trustee, complainant, against the said Western Pacific Railway Company and others, and pursuant to a master's sale as therein directed and afterwards approved by the court, the petitioner, by deed of Francis Krull, special master, and others, dated July 1, 1916, acquired all of the railways, property, assets, and choses in action belonging to the said Western Pacific Railway Company or to Frank G. Drum and Warren Olney, jr., as receivers of the said Western Pacific Railway Company appointed in said cause, and in a certain cause ancillary thereto pending in the District Court of the United States for the District of Utah, who, as such receivers, operated the railway properties of said Western

Pacific Railway Company during the period from March 3, 1915, in the one case, and March 6, 1915, in the other, until July 14, 1916, when the said receivers turned over to the petitioner the railways, property, and assets of said Western Pacific Railway Company, since which time the petitioner has operated the said railways; and hereinafter in the paragraphs relating to transportation and settlements therefor the term "claimant" is, for convenience, used to designate the said Western Pacific Railway Company, the said receivers, or the petitioner herein, as the case may be.

15

IV.

Under the acts by which lands were granted in aid of the construction of railroads and subsequent legislation of Congress, the rates for the transportation of Government troops and property on land-grant railroads during the times hereinafter mentioned were fifty per centum of the rates for transportation of similar character for private accounts; but the provisions in the said acts granting lands in aid of the construction of railroads and reserving special privileges to the United States in respect of the use of such railroads, were limited to the transportation of property and troops of the United States.

V.

Heretofore and before the transactions hereinafter mentioned, railroad companies of the United States generally, including the said Western Pacific Railway Company, severally agreed with the Quartermaster General of the United States Army that they would each accept

"for the transportation of property moved by the Quartermaster Corps, United States Army, and for which the United States Government is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement."

which said agreements, known as "equalization agreements," are set out in Circular No. 23, Quartermaster General's Office, 1911 dated November 15, 1911, and Circular No. 6, Office of the Chief, Quartermaster Corps, 1913, dated March 1, 1913. By virtue of such agreements the rates for shipments covered thereby were fixed by the published tariff rates by way of the practicable route between the terminal points of the movement affording the largest proportion of land-grant mileage less proper land-grant deduction applicable to such land-grant mileage involved.

VI.

By circular approved by the Secretary of the Treasury under date of October 29, 1907, and printed in 14 Decisions of the Comptroller

of the Treasury, at pages 967 et seq., a form of bill of lading was prescribed for freight shipments by the United States, on the back of which appeared, among others, the following conditions and instructions:

16 "Conditions.

"It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of freight charges will in no case be demanded by carriers. Upon surrender of this bill of lading duly accomplished payment will be made to the last carrier, except where otherwise specifically stipulated.

"2. For railway transportation this bill of lading is subject to all the conditions of the uniform or standard bills of lading, and for express shipments to all the conditions contained in the standard form of receipt issued by express companies, except as otherwise specifically provided hereon.

"3. Shipments made upon this bill of lading shall take the rate provided for shipments made upon the uniform or standard bills of lading of standard receipts. * * *

"Instructions.

"1. Government property will be transported on the prescribed form of Government bill of lading which will be identified by serial numbers.

* * * * * * *

"3. When shipments are made under contract or special rates, notation of such fact should appear on the face of the bill of lading.

"4. Officers charged with the duty of providing or securing Government transportation should familiarize themselves with land-grant railroads in order that shipments may be made at the lowest rates available to the Government by the use of such lines, or lines equalizing rates therewith.

* * * * * * *

"7. Public property may be delivered by any Government officer or agent to the Quartermaster's Department of the Army, which will ship the same under its regulations. (23 Stat., 111.)

"8. Only one copy of a bill of lading will be issued for a single shipment. This bill, when receipted by the agent of the receiving carrier, will be returned to the consignor and by him mailed to the consignee, who will, upon receipt of the shipment, accomplish and surrender the bill to the last carrier. This bill then becomes the evidence upon which settlement for the service will be made. * * *"

## VII.

The said circular of October 29, 1907, also prescribed forms of "Public voucher for transportation of freight," one for cases not involving land-grant mileage, and one for cases involving land-grant mileage, the latter of which provided columns for entry of class symbol, bill of lading date and number, initial point of shipment and destination, mileage, total and land-grant, class or commodity, weight, rate, gross amount, amount to be deducted
17 on account of land grant, and amount claimed, and required the following certificate:

"I certify that the above account is correct and just; that the services have been rendered as stated; that payment therefor has not been received; and that the rates charged are not in excess of the lowest net rates available for the Government, based on tariffs effective at the date of service.

——— ———,
"(Name of transportation company.)
"Per ——— ———,
(Name and capacity.)"

And upon the back of the form of so-called voucher appeared the following, among other, instructions:

"3. Payment for transportation of freight will be made to the last carrier, unless otherwise provided in the bill of lading, upon the voucher form accompanied by the corresponding accomplished bills of lading," etc.

## VIII.

Under the regulations of the United States Army in force at the times hereinafter mentioned, each and every officer of the Army, when changing station, was entitled to the transportation, at the expense of the Government, of a certain weight of household goods or other personal property belonging to him, such weight being graded by his rank; and Army officers, when proceeding to or changing station, were entitled to transportation, at the expense of the Government, of the number of private mounts (horses owned by them) for which they were entitled to forage according to their rank. By the act of March 3, 1910, excess baggage was authorized to be shipped with the regulation allowance and reimbursement collected for transportation charges on such excess.

## IX.

The Comptrollers of the Treasury, before there were any decisions touching upon the question and continuously during the whole period since the determination of proper rates to be paid land-aided roads for Government transportation had first been for consideration, had uniformly treated the transportation of Army officers' effects on change of station as subject to land-grant rates, and settle-

ment had always been made on that basis. Such property was treated by them as vested with a quasi public character. The first specific presentation of the question to the Comptroller as to the application of land-grant rates to officers' effects on change of station was in the Quincy Bridge case, under an act providing that no higher rate should be charged for transportation over the Quincy Bridge of the troops and munitions of war of the United States than the rate per mile paid for their transportation over the railroads leading to the bridge, but the question presented to and decided by the Comptroller in that case was as to the rate applicable over the bridge under that act, and no question was made in that case as to the application of land-grant rates to the shipment involved over the railroads leading to the bridge. In a case decided by the Comptroller in 1904 the question was presented as to the application of land-grant rates to the excess of officers' effects over the regulation allowance, as to which the railroad company contested the application of land-grant rates, and the Comptroller held that commercial rates should apply to such excess, but no question was made in that case as to the application of land-grant rates to the regulation allowance. In these and a number of other decisions of the Comptroller reference was made to the uniform holding that land-grant rates was applicable to the effects of Army officers changing station under orders and to the
18 established and long-continued practice to that effect, which was generally understood, but the applicability of such rates to such transportation had never been specifically questioned by any railroad company in any appeal to the Comptroller. No action was ever instituted in this court by any railroad company to recover commercial rates for such transportation until an action by the Chicago, Milwaukee & St. Paul Railroad Co., No. 32567, was commenced November 9, 1914, in which case the court on February 8, 1915, rendered judgment in favor of the plaintiff for the amount found to have been deducted by the accounting officers on account of land grant.

X.

During the whole of the period embraced in this suit settlements of charges for freight shipments in cases where the claimant was the last carrier, were made by the office of the depot quartermaster at San Francisco, California.

XI.

From the time the Western Pacific Railway Company commenced to haul freight, and continuing during the period embraced in this suit, settlements for charges on freight shipments on Government bills of lading were in charge of one David A. McLean, head of the freight revising bureau in the office of the general auditor of the plaintiff at San Francisco, California. Vouchers required by the Government system of accounting and settlement were signed by said general auditor.

Vouchers when paid constituted the officer's acquittance in the

settlement of his accounts. They were, therefore, only to be paid in the amount stated and claimed, interlineations or erasures were prohibited, and errors in a statement of a voucher were corrected by stating and certifying a new voucher. A disbursing quartermaster could not properly and without danger of disallowances in the settlement of his own accounts pay more than was authorized by decisions of the Comptroller.

XII.

Between the 10th of June, 1910, and the 18th day of March, 1915, the plaintiff, at the request of the United States, as shipper or consignor, received from other railroad companies at connecting points, on Government bills of lading, and transported over its lines aforesaid, effects and property of various officers of the United States Army, changing stations under orders.

XIII.

During this period it was the practice of said McLean to revise the bills of lading and apply the rates applicable on the traffic at commercial rates, make the land-grant deduction and compute the freight charges at the net rate. After a month's bills of lading had been revised it was his practice to check up with the quartermaster's office and adjust differences, where there were any differences,
19 as to the correct charges. He then caused the claims to be stated on the prescribed voucher form and after being signed they, with the bills of lading attached, were forwarded to the quartermaster for payment. It appears that to the best recollection of said McLean he stated the first of these claims, during this period, at commercial rates, but being informed by the quartermaster's office of the applicability of land-grant rates under the holding of the Comptroller and the established practice he restated the claim on a land-grant basis. It further appears that he had just come to the service of the plaintiff; that he had had no experience in the rendering of bills for Government transportation; that as soon as he learned the custom with reference thereto he rendered bills for transportation of the character here involved at land-grant rates and continued to do so during all of said period. The rendering of the bill referred to at commercial rates, if in fact he so rendered it, was due to his ignorance of established practice and not because of any intention to question the propriety of the practice or to claim as a matter of right the application of commercial rates. It is not shown that at any time during this entire period he ever questioned the application of land-grant rates to such transportation or protested any settlements on that account, but all bills rendered by him, except as stated, were rendered at land-grant rates, and when so rendered he did not expect any further compensation and never expected compensation at other than land-grant rates until after the decision of the Chicago, Milwaukee and St. Paul case by this court.

The difference between the amounts claimed by the plaintiff and said on account of said transportation during said period and the

amount it would have received had it claimed and been paid full commercial rates without land-grant deduction is $5,760.89.

## XIV.

Between the 18th day of March, 1915, and the 1st day of August, 1916, the plaintiff, at the request of the United States as shipper or consignor, received from other railroad companies at connecting points, on Government bills of lading and transported over its lines aforesaid, effects and property of various officers of the United States Army; and the claimant, as the last or delivering carrier, was entitled to payment for all of such transportation at the regular published tariff rates applicable. Nevertheless, the Government disbursing and accounting officers allowed and issued warrants for net amounts after making land-grant deductions, although the claimant's auditor or agent, being then advised of the decision of this court in the case of the Chicago, Milwaukee and St. Paul Railway Company, submitted in each of such cases a voucher wherein the full published tariff rate and charge was stated as the amount due and payable, and such warrants were by the claimant accepted under protest, or a voucher showing land-grant deduction was submitted, with the endorsement "stated at net cash rate under protest." And the amounts so deducted and withheld on all of said shipments mentioned in this paragraph, amounting in the aggregate to $851.78, still remain due and unpaid.

20 *Conclusion of Law.*

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $851.78, as shown in Finding XVII. It is therefore adjudged and ordered by the court that the plaintiff recover of and from the United States the sum of eight hundred and fifty-one dollars and seventy-eight cents ($851.78).

The petition as to the other amounts claimed is dismissed.

On the authority of the decision in the Denver and Rio Grande Railroad Company v. United States, No. 33301, decided this date.

## V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 7th day of May, A. D., 1919, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the claimant, and do order, adjudge and decree that The Western Pacific Railroad Company, as aforesaid, is entitled to recover and shall have and recover of and from the United States, the sum of Eight Hundred and Fifty-one Dollars and Seventy-eight cents ($851.78), on the authority of the decision in the Denver and Rio Grande Railroad Company v. United States, No. 33301, decided this date.

BY THE COURT.

21 VI. *Opinion of the Court, by Hay, J., Entered May 5, 1919, in the Case of The Denver & Rio Grande R. R. Co., No. 33301.*

*Opinion.*

HAY, *Judge*, delivered the opinion of the court:

This is a suit for the recovery of $2,854.98 alleged to be due the plaintiff by the defendants, which amount is in addition to the amount paid the plaintiff on account of items of freight transportation furnished to and paid for by the United States. All the payments were made by disbursing officers on vouchers certified to be correct and presented to them by the plaintiff. The plaintiff now seeks to recover the difference between the amounts thus claimed and paid and the amount the plaintiff would have received had payment been claimed and made at commercial rates without any deductions on account of land grant, the plaintiff asserting that the property transported was not the property of the United States, and therefore not subject to land-grant deductions, the property being the effects of Army officers. In effect, the plaintiff, after it had been paid what it claimed was due it, now asserts that it did not claim enough for the service rendered; that it ought to have claimed the above amount in addition to what it did claim; that it was misled by certain decisions of the Comptroller of the Treasury; that it made a mistake in claiming only the amount which it did claim, and that the defendants were responsible for that mistake, which should now be rectified by this court.

The case is clearly within the holding of this court in Baltimore & Ohio Railroad Co. v. United States, 52 C. Cls. 468, and Oregon-Washington Railway & Navigation v. The United States, this day decided, except as to one item of the above claim, which will be dealt with later in this opinion.

The claim that the plaintiff was misled by the decisions of the Comptroller, and was thereby prevented from demanding what was due it, can not be entertained. Ignorance of the law is no excuse. And it is hardly conceivable that the plaintiff, which at all times has in its employment the best legal talent, could have been misled in a matter of this sort, or could have been ignorant of its rights in the premises. It must have agreed with the Comptroller in his interpretation of the statutes; and certainly for many years it continued to present and certify its vouchers, claiming amounts which were paid by the defendants, and not expecting to receive any amount in addition thereto. As was said in Baltimore & Ohio Railroad Co., supra, p. 473: "Indeed, we may well know that if there had been any protest on the part of the railroad company against this basis of settlement, or any claim for payment at a higher rate, the transactions would otherwise have presented themselves. If a quartermaster refused payment on a basis thought to be correct by the railroad company, it was always its right to file a claim with the auditor, and upon adverse action by him, to appeal to the Comp-

troller of the Treasury." To which may be added that if it was not satisfied with the action of the Comptroller it had the right to bring its claim to this court for adjudication. It is unconceivable that the plaintiff should have been ignorant of its rights as above set out, and the only explanation of its action is that it did not believe that it was receiving for its services anything less than it was entitled to. But if the interpretation of the Comptroller was wrong, and the plaintiff acquiesced in that interpretation, can it now in this court make a claim for the additional amount, which it has never before claimed? Is it not subject to the usual rule as to mistakes of law? We think it is, and as that rule is fully discussed in Baltimore & Ohio Railroad Co., supra, 482, it is not necessary to discuss it here.

The petition of the plaintiff must be dismissed as to all of the amount sued for except the amount of $64.31, set out in Finding XIX. This amount was disallowed by the auditor after it had been claimed, and should not have been deducted, as the property transported was not Government property, and land-grant deductions should not have been made from the amount claimed.

22 VII. *Proceedings After Entry of Judgment.*

On June 6, 1919, the claimant filed a motion for additional findings of fact. On June 28, 1919, this motion was allowed in part and overruled in part and Finding XI amended, as appears on page 18 of this record.

VIII. *Claimant's Application for, and Allowance of, an Appeal.*

Comes now the claimant, by its attorneys, and notes an appeal to the Supreme Court of the United States from the judgment in the above entitled cause and, showing to the court that more than $3,000.00 is involved therein, prays the court to allow its said appeal and certify the record to the Supreme Court of the United States.

CLARK, PRENTISS & CLARK,
*Attorneys for Claimant.*

Filed June 6, 1919.

Ordered: That the above appeal be allowed as prayed for.
EDWARD K. CAMPBELL,
*Chief Justice.*

June 30, 1919.

23 Court of Claims.

No. 33678.

THE WESTERN PACIFIC RAILROAD COMPANY

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact (as amended) and conclusion of law; of the judgment of the court; of the opinion of the court by Hay, J., in the case of The Denver & Rio Grande Railroad Company, No. 33391; of the claimant's application for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this First day of July, A. D., 1919.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
*Assistant Clerk Court of Claims.*

Endorsed on cover: File No. 27190. Court of Claims. Term No. 435. The Western Pacific Railroad Company, appellant, vs. The United States. Filed July 3d, 1919. File No. 27190.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 136

THE WESTERN PACIFIC RAILROAD COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

# BRIEF FOR APPELLANT.

WILLIAM C. PRENTISS,
*Attorney for Appellant.*

## INDEX.



### Cases.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

# No. 168.

THE WESTERN PACIFIC RAILROAD COMPANY,
APPELLANT,

*vs.*

THE UNITED STATES.

## BRIEF FOR APPELLANT.

### Statement.

This was a suit by the appellant, as final carrier, to recover amounts withheld by the accounting officers of the Government as land-grant deductions in settlements for interline interstate movements of personal effects of Government officers on Government bills of lading.

This case is similar to No. 166, *Oregon-Washington Railroad and Navigation Company vs. United States*, and other cases pending in the Court of Claims, but is *sui generis*, in that the Western Pacific Railroad was not completed and in operation until 1910, and that the suit embraced all of its

dealings with the Government as final carrier of interline interstate shipments of personal effects of Government officers, so that there is absent the element of previous course of dealings relied upon by the Government, and in that there was introduced specific evidence as to the presentation of voucher at full tariff rates for the first shipment and requirement by the disbursing officer that such voucher be revised and subsequent vouchers presented in accordance with the settled ruling of the Comptroller of the Treasury requiring the application of land-grant deduction, upon which evidence the court below made findings of fact (Findings X-XIII, Record, pp. 13-14), which will be referred to later.

The court below held (and we assume that the Government here concedes) that land-grant deductions were not applicable to the shipments in question, but reached the conclusion that the railroad, by revising its first voucher and presenting subsequent vouchers in accordance with the Comptroller's ruling and receiving the amounts which the disbursing officer under such ruling was permitted to pay, estopped itself from claiming the balances to which it was entitled.

It appears, however, that the form in which the vouchers were prepared and submitted and the situation now presented are attributable solely to the governmental regulations requiring a uniform bill of lading for Government shipments (Finding VI, Record, pp. 10-11; and see form in full in Finding V in No. 166) and requiring, as a condition of payment, the presentation of a so-called voucher in prescribed form, one for cases not involving land-grant mileage and one for cases involving land-grant mileage, either directly or through the so-called equalization agreements (Finding VII, Record, p. 12; and see full form of land-grant voucher in Finding V in No. 166); and to the fact that such vouchers when paid constituted the disbursing officers' acquittance in the settlement of his accounts and could properly be paid

only when they stated amounts authorized by decisions of the Comptroller (Finding XI, Record, pp. 13-14).

Upon the back of the form of bill of lading appeared the following conditions and instructions:

"**Conditions.**

"It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of freight charges will in no case be demanded by carriers. Upon surrender of this bill of lading duly accomplished payment will be made to the last carrier, except where otherwise specifically stipulated.

"2. For railway transportation this bill of lading is subject to all the conditions of the uniform or standard bills of lading, and for express shipments to all the conditions contained in the standard form of receipt issued by express companies, except as otherwise specifically provided hereon.

"3. *Shipments made upon this bill of lading shall take the rate provided for shipments made upon the uniform or standard bills of lading or standard receipts.* * * *

"**Instructions.**

"1. Government property will be transported on the prescribed form of Government bill of lading, which will be identified by serial numbers.

* * * * * * *

"3. When shipments are made under contract or special rates, notation of such fact should appear on the face of the bill of lading.

"4. Officers charged with the duty of providing or securing Government transportation should familiar-

ize themselves with land-grant railroads in order that shipments may be made at the lowest rates available to the Government by the use of such lines, or lines equalizing rates therewith.

* * * * * * *

"7. Public property may be delivered by any Government officer or agent to the Quartermaster's Department of the Army, which will ship the same under its regulations. (23 Stat., 111.)

"8. Only one copy of a bill of lading will be issued for a single shipment. This bill, when receipted by the agent of the receiving carrier, will be returned to the consignor and by him mailed to the consignee, who will, upon receipt of the shipment, accomplish and surrender the bill to the last carrier. *This bill then becomes the evidence upon which settlement for the service will be made.* * * *"

The form of voucher for use in cases involving land-grant mileage provided columns for entry of class symbol, bill of lading date and number, initial point of shipment and destination, mileage, total and land-grant, class or commodity, weight, rate, gross amount, amount to be deducted account of land grant, and amount claimed, and required the following certificate:

"I certify that the above account is correct and just; that the services have been rendered as stated; that payment therefor has not been received, and that the rates charged are not in excess of the lowest net rates available for the Government, based on tariffs effective at the date of service.

.....

(Name of transportation company.)

Per .....

(Name and capacity.)"

Upon the back of the form of so-called voucher appeared the following, among other, instructions:

> "3. Payment for transportation of freight will be made to the last carrier, unless otherwise provided in the bill of lading, upon the voucher form accompanied by the corresponding accomplished bills of lading," etc.

All of the settlements of charges for freight shipments where the Western Pacific Railroad was the final carrier were made by the office of the depot quartermaster at San Francisco (Finding X, R., p. 13), and such accounts were handled for the railroad by one McLean, head of the freight-revising bureau in the office of the general auditor of the railroad at San Francisco. In Finding XIII (R., p. 14) the court below presents the testimony of McLean as to the first and subsequent settlements for shipments up to March 18, 1915 (covering items of claim amounting to $5,760.89, which it rejected), as follows:

> During this period it was the practice of said McLean to revise the bills of lading and apply the rates applicable on the traffic at commercial rates, make the land-grant deduction and compute the freight charges at the net rate. After a month's bills of lading had been revised it was his practice to check up with the quartermaster's office and adjust differences, where there were any differences, as to the correct charges. He then caused the claims to be stated on the prescribed voucher form and after being signed they, with the bills of lading attached, were forwarded to the quartermaster for payment. It appears that to the best recollection of said McLean he stated the first of these claims, during this period, at commercial rates, but being informed by the quartermaster's office of the applicability of land-grant rates under the holding of the Comptroller and the established practice he restated the claim on a land-grant basis. It further appears that he had just come to the service of the plaintiff; that he had had no experience

> in the rendering of bills for Government transportation; that as soon as he learned the custom with reference thereto he rendered bills for transportation of the character here involved, at land-grant rates and continued to do so during all of said period. The rendering of the bill referred to at commercial rates, if in fact he so rendered it, was due to his ignorance of established practice and not because of any intention to question the propriety of the practice or to claim as a matter of right the application of commercial rates. It is not shown that at any time during this entire period he ever questioned the application of land-grant rates to such transportation or protested any settlements on that account, but all bills rendered by him, except as stated, were rendered at land-grant rates, and when so rendered he did not expect any further compensation and never expected compensation at other than land-grant rates until after the decision of the *Chicago, Milwaukee and St. Paul* case by this court.

In its opinion in the Oregon-Washington Railway and Navigation Company case (Record in No. 166, at p. 25) the court below concedes that it would have been fruitless to state the vouchers at tariff rates and appeal to the auditor and in turn to the Comptroller, saying:

> "As to this procedure it is argued that it would have been fruitless because the auditor would have made the settlement at land-grant rates, disallowing the excess, and it was understood to be useless to appeal to the Comptroller. *True enough; and so far as payment was concerned the result would have been the same.*"

Although not specifically so stated in the findings, all of the movements involved originated east of Salt Lake City and were received by the Western Pacific at that point and transported to San Francisco, so that this case involves only interstate movements.

Items of claim covering shipments subsequent to March 18, 1915, amounting to $851.78, were allowed (Finding XIV, R., p. 15) and judgment therefor entered, from which the Government has not appealed.

## ARGUMENT.

We are here concerned with the case of a final carrier of interline interstate movements, and it is immaterial whether land-grant mileage was directly involved in any movement embraced in the claim, or whether the shipments were routed entirely over non-land-grant lines. In the first case the land-grant factor would be injected by the land-grant act applicable. In the latter case the land-grant factor would be injected solely by the equalization agreements entered into by the railroads generally with the Quartermaster General, whereby they agreed to accept

> "for the transportation of property moved by the Quartermaster Corps, United States Army, and for which the United States Government is *lawfully entitled to reduced rates over land-grant roads*, the lowest net rates *lawfully available* as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement."
>
> Finding V, R., p. 10

Thereby the railroad companies accorded the United States reduced rates, as authorized by section 22 of the Interstate Commerce Law, but only as to *property* "for which the United States is *lawfully* entitled to reduced rates over land-grant roads," and such reduced rates to be the "lowest net rates *lawfully* available as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement."

As we are concerned here only with property for which the United States is *not lawfully* entitled to reduced rates over land-grant roads, both the land-grant acts and the equalization agreements disappear from the equation, and there remains the plain case of shipments made at the published tariff rates, on account of which the claimant, as the final carrier, has been paid less than the full amount and is suing for the difference.

## I.

Before the passage of the Interstate Commerce Law the last carrier of an interline shipment was, as a matter of general railroad law, entitled to hold a lien and sue for the total freight charge.

2 Hutchinson on Carriers, 3d ed., sec. 826, p. 920.
2 Moore on Carriers, 2d ed., sec. 13, page 683.

> "The plaintiff, as the last carrier of the freight, was entitled to collect the lawful charges of its preceding carriers. This is a right long sanctioned by law and custom and is founded in public convenience and common sense. Travis *vs.* Thompson, 37 Barb., 236; Merrick *vs.* Gordon, 20 N. Y., 93. In the case last cited Judge Comstock said: 'The freight being entire for the whole distance between New York and Cleveland, was not due until the goods arrived there. It was then due to the plaintiffs (the last carrier) because they were then the carriers having the goods at their destination subject to the charge. When the defendant received them he promised in judgment of law, if not in fact, to pay the amount of that charge and on that promise the suit is founded.'"
>
> New York Central R. Co. *vs.* Weil, 119 N. Y. Suppl., 676, 678.

Under the Interstate Commerce Law the final carrier is not only empowered to collect the through charge, but is burdened with the duty and obligation of collecting the full published tariff rate and is powerless to relieve or release a shipper or consignee from any part of the same.

In Poor *vs.* C., B. & Q. Ry. Co., 12 I. C. C., 418 (1907), the Interstate Commerce Commission stated the law as declared in decisions of this court (syllabus):

> "1. The published rate governing transportation between two given points, so long as it remains uncanceled, is as fixed and unalterable by the carrier as if that particular rate had been established by a special act of Congress. *When regularly published, it is no longer the rate imposed by the carrier, but the rate imposed by the law.*
>
> "2. Regardless of the rate quoted or inserted in a bill of lading, the published rate must be paid by the shipper and actually collected by the carrier. The failure on the part of the shipper to pay or of the carrier to collect the full freight charges, based upon the lawfully published rate for the particular movement between two given points, constitute a breach of the law and will subject either one or the other, and sometimes both, to its penalties. Not even a court may interfere with a published rate or authorize a departure from it when it has voluntarily been established by the carrier.
>
> "3. While shippers largely rely upon the rates quoted by freight agents and billing clerks, the law charges them with knowledge of the lawful rates. And they will not be heard, before this Commission, to claim the benefit of a lower than the lawful rate on the ground that some railroad clerk has made a mistake in quoting a lower rate for a particular shipment. To permit shippers to impute negligence to carriers in quoting rates and on that ground to enjoy the rate quoted instead of paying the lawfully published rate would open the way for the payment of rebates and might, in practical results, work a repeal of the law."

See the full discussion of the subject at pages 421-424.

And see I. C. C. Conference Rulings, 16, 156, 262, and 314.

And for full citation of authorities see 4 Federal Statutes Annotated, Second Edition, p. 415, VI, Effect of Published Rates, and p. 416, 3, Contracts of Transportation.

Upon the particular point here involved it will suffice to notice the case of Louisville and Nashville R. Co. *vs.* Maxwell, 237 U. S., 94, where the railroad company's agent at Nashville sold Maxwell two tickets to Salt Lake City and return, for $49.50 each, when the published tariff rate over the lines by which the tickets were routed was $78.65. Afterward the railroad company sued Maxwell for the difference. This court, sustaining the right of recovery, said (pp. 97-98):

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. * * *
>
> "The scope and effect of the provisions of the statute as to filing tariffs (both in their present form and as they stood prior to the amendments of 1906), have been set forth in numerous decisions. Gulf, Col. & Santa Fe Rwy. *vs.* Hefley, 158 U. S., 98; Tex. & Pac. Rwy. *vs.* Mugg., 202 U. S., 242; Tex. & Pac. Rwy. *vs.* Abilene Cotton Oil Co., 204 U. S., 426, 445; Armour Packing Co. *vs.* United States, 209 U. S., 56, 81; N. Y. C. & H. R. R. *vs.* United States, 212 U. S., 500, 504; Chicago & Alton R. R. *vs.* Kirby, 225 U. S., 155, 166; Illinois Central R. R. *vs.* Henderson Co., 226 U. S., 441; Kansas Southern Rwy. *vs.* Carl, 227 U. S., 639, 653; Pennsylvania R. R. *vs.* International Coal Co., 230 U. S., 184, 197; Boston & Maine R. R. *vs.* Hooker, 233 U. S., 97, 110-113; George N. Pierce Co. *vs.* Wells, Fargo & Co., 236 U. S., 278, 284. In the Mugg Case, *supra*, it appeared that a rate, less than the lawful scheduled rate had been quoted to the shipper by the agent of the railroad. The shipper had relied upon

the quoted rate in making his shipments and sales. But it was held that he was bound to pay the established rate and was not entitled to the delivery of the goods without such payment. This was upon the ground that it was beyond the power of the carrier to depart from the filed rates and that the erroneous quotation of the rate by its agent did not justify it in making a different charge from that which was lawfully applicable to the shipment. As was said in Kansas Southern Rwy. *vs.* Carl, *supra:* 'Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be compelled to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid.' It was 'the purpose of the act to have but one rate, open to all alike and from which there could be no departure.' Boston & Maine R. R. *vs.* Hooker, *supra*, p. 112. The rule is applicable to the transportation of passengers and their baggage. *Id.*"

The provision in section 22 of the Interstate Commerce Law "that nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments," etc., is special authority for carriers to depart from established tariff rates (I. C. C. Conference Ruling 208*e*), and extends only to Government property (I. C. C. Conference Rulings 33, 36 and 452.) The fact that the Government assumes the freight charge is immaterial (I. C. C. Conference Rulings 107, 431).

And that the Government recognizes that (except as provided in section 22) it is reciprocally bound by, and entitled to the benefit of, the Interstate Commerce Law, is evidenced by the numerous instances where it has applied to the Interstate Commerce Commission for relief (United

States *vs.* Adams Express Co., 16 I. C. C., 394; United States *vs.* B. & O. R. Co., 15 I. C. C., 470; United States *vs.* D. & R. G. R. Co., 18 I. C. C., 7; United States *vs.* N. Y., P. & N. R. Co., 15 I. C. C., 233; United States *vs.* A. & V. Ry. Co., 40 I. C. C., 406). In the case last cited the carriers challenged the power of the Commission to require the establishment of a rate on stamped envelopes and stamped newspaper wrappers belonging to the Government and shipped on Government bill of lading, on the ground that the railroads were not common carriers of Government stamped articles but essentially private carriers under special contracts. The Commission held that it had authority to prescribe reasonable ratings for the traffic in question (and did so), but that under section 22 of the act the carrier and the Government could agree upon some other lower rate.

It follows, therefore, that as to property not belonging to the Government but transported on Government bill of lading, the Government stands in the same position as an individual shipper and is obligated by the law to pay the regular published tariff rates.

And instead of the Government being permitted to take advantage of alleged acquiescence of the railroads, as held by the court below, the Interstate Commerce Law estops the final carrier from acquiescence in settlement for transportation of effects and property of Government officers and employees at reduced rates, and estops the Government from setting up any such alleged acquiescence as a bar to recovery of the full tariff rates.

Even if section 22 of the Interstate Commerce Act could be construed to authorize the carriers to contract with the Government for reduced rates on other than Government property—officers' effects, for instance—the situation here would not be changed, for the shipments in question were made expressly at the regular tariff rates. The equalization agreements did not apply, because the property of

officers and employees was not property as to which the Government was *lawfully* entitled to land-grant rates. The regular tariff rates became the *rates fixed by law* and the final carrier could not by settlements, voluntary or otherwise, with the Government officers, waive its right and obligation to collect the full amount.

Nor can it be said that voluntary acceptance by other railroads before the Western Pacific was in existence, of land-grant rates on officers' and employees' effects for years, if such were the fact, operated to establish an understanding or agreement with the Government for such reduced rates, even assuming that such an understanding or agreement would be authorized by section 22. The answer is that such an implied agreement would be contrary to the express contract embodied in the form of Government bill of lading upon which each shipment was made. An implied contract can be raised only in the absence of an express contract.

Nor could such assumed voluntary acceptance of land-grant rates in prior settlements, be projected into later bill of lading contracts as evidencing intent of the contracting parties.

The intention of the parties to a contract is evidenced by the language used. The language of these bills of lading is plain. There is no ambiguity or uncertainty justifying or requiring exploration of extraneous or surrounding circumstances or previous dealings, in order to ascertain the intent of the parties. Each contract called for the rate provided for shipments upon the uniform or standard bills of lading, that is to say, published tariff rates, with the proviso that the Government should have the benefit of rates available to it when shipments were routed over land-grant roads or lines equalizing therewith. Such land-grant rates were available only as to property of the Government.

These distinctions were appreciated and well stated in Pickley *vs.* U. S., 46 Ct. Cls., 77, at 91:

"A custom may be shown to explain a written contract when doubt arises as to the meaning of words or expressions of doubtful character and various senses; in other words, when there is something to explain. But when its provisions are plain and susceptible of but one meaning, no custom or usage can contradict them."

## II.

Even aside from the controlling effect of the Interstate Commerce Law, the ruling of the court below will be found, upon analysis of the relations between the Government and the railroads, to be based upon misapprehension.

In the first place, it is to be observed that in none of the opinions of the court below is there recognition of the fact that each bill of lading was a separate and distinct contract definitely fixing the freight charge, that the accomplished bill of lading was expressly made the evidence upon which settlement for the service would be made, and that the freight charge was a liquidated claim or debt. The court below seems to proceed upon the erroneous assumption that the shipments were made without agreement as to the freight charge, and that the so-called voucher was the effective making by the carrier of its charge for the service.

For its own convenience the Government imposed upon the railroads the practice of freight shipments on uniform Government bill of lading, form for which was prescribed by the Comptroller of the Treasury, first in 1907 (14 Comp. Decns., 967).

By acceptance of shipments under that form of bill of lading the railroads waive the right to demand prepayment of the freight charge, either at the time of shipment or before delivery, and after delivery at destination the freight charge becomes a claim of the final carrier against the United States, the amount of which is definitely fixed by the condition on the bill of lading itself that the shipment "shall take the rate provided for shipments made upon the

uniform or standard bills of lading," subject to the further condition that the Government shall have the benefit of rates *available* to it when the shipments are routed over land-grant roads or lines equalizing therewith. Such reduced rates are *not* available in respect of effects or property of officers or employees.

The bill of lading, when accomplished and returned to the last carrier, is made "the evidence upon which settlement for the service will be made," and the last carrier is recognized and designated as entitled to receive payment.

The Government also imposed upon the final carrier as a condition of receiving settlement, the burden of preparing and submitting with the accomplished bill of lading a so-called voucher (form for which was also prescribed by the Comptroller of the Treasury, see *supra*), with the following certificate:

> "I certify that the above account is correct and just; that the services have been rendered as stated; that payment therefor has not been received, and that the rates charged are not in excess of the lowest net rates available for the Government, based on tariffs effective at the date of service."

The question at once suggests itself, What is the function of such voucher?

The function of the voucher cannot be to enlighten the disbursing or accounting officers as to the matters shown on the bill of lading.

Nor can the function of the voucher be to enlighten the disbursing or accounting officers as to the rate, total mileage, or land-grant mileage, if any. The Government officers already have the same information regarding those matters as the officers of the railroads. The rates are contained in published tariffs, copies of which are in the possession of the Government officers. And all information regarding distances and land-grant roads is contained in pamphlets pub-

lished by the War Department, copies of which are also in possession of the Government officers.

And the function of the voucher is not to fix the amount of the claim. As stated before, the amount of the claim is fixed by the published tariffs, subject to proper land-grant deduction, if any, either directly by reason of land-grant mileage involved or indirectly through the equalization agreements. Here, the land-grant factor being eliminated, the published tariff rates were the measure of the amount of the claim.

And the function of the voucher is not to *limit* the carrier to the amount appearing as the amount claimed, like the *ad damnum* clause at common law.

The Government disbursing and accounting officers do not deal with the railroads at arm's length, as it were, and, for the Government, take advantage of the form of the voucher as submitted to escape a just obligation. On the contrary, the duty and endeavor of the Government officers, as well as the representatives of the railroads, is to ascertain the amount legally due. The Government officers take the bill of lading and from their own records make an independent ascertainment of the amount legally due. If they find that the voucher states an amount greater than they find to be lawfully due, they revise it downward. If they find that it states an amount smaller than they find to be lawfully due, they revise it upward. This is recognized practice of long standing. Particular instances of revision upward in settlements of items here involved were testified to by McLean, but ignored in the findings of the court below.

And the function of the voucher is not to determine, or bind the carrier upon, the question of land-grant deduction. On that subject the Government officers have complete and accurate information and revise the voucher upward or downward to what they find to be lawfully and justly due, or, rather, due under decisions of the Comptroller of the Treasury binding upon them.

The certification that the account is correct and true and that the rates charged are not in excess of the lowest net rates available for the Government, is without function—a mere formality. Whether the account is just and true and whether the rates are the lowest net rates available to the Government, are matters to be determined by inspection of the bill of lading, the published tariffs, and the list of land-grant roads, and such inspection is made by the Government officers wholly uninfluenced by the certificate. The certificate, as evidence of any deree, is wholly ignored.

If the voucher state a rate or charge varying from the published tariff applicable or from the lowest net rate available to the Government, the error becomes patent upon inspection of the bill of lading and the published tariffs. If it appear by the bill of lading that the property transported was private effects of an officer or employee, the land-grant factor disappears. If it does not appear by the bill of lading that the property is private property, then the error in a voucher applying land-grant rate, is latent.

In any event, the bill of lading (which is the contract between the parties and "the evidence upon which settlement will be made") is controlling and any error in the accompanying voucher is to be corrected thereby.

Even the certification that payment has not been received, is mere formality, inasmuch as settlement could be had only upon surrender of the accomplished bill of lading. Possession of the bill of lading evidences that payment has not been made.

In the final analysis, therefore, the voucher becomes a mere memorandum and, so far as settlement with the carrier is concerned, might be dispensed with. For the purpose of settlement with the carrier, the accounting or disbursing officers need only the accomplished bill of lading.

The requirement of the voucher seems to be a survival from a former period when a certified statement or account,

and not the bill of lading, was the evidence upon which settlement was made.

And settlements with the carriers are not final or conclusive. It is common practice of the Government, of which the court will take judicial notice, to reopen settlements.

In Comptroller's decision of February 21, 1914 (20 Comp. Decns., 575), it was recognized that the change of ruling therein would apply retroactively to reopen prior settlements and allow full tariff rates on excess over change of station allowance.

## III.

In none of Comptroller Tracewell's decisions was there any suggestion of acquiescence by the railroads. On the contrary, his understanding was that he was permitting to be paid to the carriers all that his view as to the construction of the language of the land-grant acts entitled them, and that the carriers had their remedy in the Court of Claims if his rulings were wrong. This is evidenced by his decision of May 12, 1904 (unpublished), in a case involving the fundamental question, wherein he said:

> "The Court of Claims is only in a modified sense bound by these precedents, and if these constructions have been wrong all these years the railroads are not without remedy and have not been for all these years."

The suggestion of "long continued practice of the accounting officers acquiesced in by the carriers generally," was first made in a decision of Comptroller Downey's in 1914. (21 Comp. Decns., 482).

As hereinbefore pointed out, acquiescence has no application here as raising an implied agreement as to rates or as injecting into the bill of lading contracts an intent contrary to the plain language thereof.

The shipments were made upon bills of lading each constituting a separate and distinct contract. The right of ac-

tion upon each of these contracts was separate and distinct. Settlement under one, or any number, at less than the contract rate, could not prejudice the right of action on any other. And outlawry of claim on earlier such contracts could not prejudice the rights of action on the later ones within the period of limitation.

Any defense to the items in suit, therefore, must arise out of the particular contracts under which the shipments were made and the conduct of the parties in connection therewith, and, however phrased, such defense resolves in final analysis into the contention that payment and acceptance in each instance constituted accord and satisfaction.

But, as hereinbefore pointed out, the doctrine of accord and satisfaction, as a defense to freight charges, has been eliminated by the Interstate Commerce Law.

Even aside from the controlling effect of the Interstate Commerce Law, the doctrine of accord and satisfaction would not apply, for there would then be presented the plain case of payment by the Government of less than it contracted to pay in each of the numerous express contracts, without any consideration to the claimant and without any prejudice to the Government.

The contract in each instance called for full tariff rates. Payments were made by Government disbursing officers whose duty was to pay the rates contracted for in each bill of lading, but who were controlled by erroneous decisions of the Comptroller of the Treasury and permitted to pay only land-grant rates.

The Government system of settlement and accounting, and that alone, was responsible for the certification by the claimant's general auditor (who had no authority to depart from the tariff rates fixed and published by its traffic department) of the so-called vouchers, as the condition of receiving payment to the extent to which the Government officers were so permitted to make payment. Any other course would have led to the same result, as conceded by the court below.

The claimant's general auditor signed the certificates to the so-called vouchers, as required by the Government system of accounting; but the certification that the accounts were correct and just was, as we have shown, without function so far as settlement between the Government and the claimant was concerned, and might have been dispensed with. If anything more than formality, it was no more than certification that the account was correct and just in that it was in accordance with the decisions of the Comptroller of the Treasury binding upon the accounting and disbursing officers. At most, it must be regarded as exacted by a situation which amounted to coercion.

And the certification that the rates charged were not in excess of the lowest net rates available to the Government, was true—they were not in excess of, but less than, the rates available to the Government.

And finally (and what would be the controlling consideration if the Interstate Commerce Law had not foreclosed the inquiry) the Government has not been prejudiced by the settlements at land-grant rates. The rates on all the through routes were the same. The railroads were, as shown before, barred by the Interstate Commerce Law from making concession to the Government in respect of shipments of private property; but even if section 22 could be construed to permit such concession, there was in fact none, and it cannot be assumed that any of the railroads would have granted any. The extent of the concession made by them was equalization with rates to which the Government was lawfully entitled on land-grant roads between the terminal points in any case.

If the Interstate Commerce Law were not controlling and the claimant had receipted for the payments as in full, or the so-called vouchers could be regarded as equivalent to such receipts in full, and the claimant had shared the Comptroller's mistake of law, the fact that the Government has not been prejudiced would still be controlling.

The case of Great Northern Ry. Co. vs. U. S., 42 Ct. Cls., 259, is directly in point. There the railway company operated an all land-grant road between two points on which it ran its freight trains; but for its passenger and mail trains it used for a part of the distance a cut-off over a section of non-land-grant road. Under contract with the Postmaster General providing for the statutory rates of compensation (which were subject to land-grant deduction for land-grant distance) the railway company carried the mail over the shorter route embracing land-grant and non-land-grant mileage. The Postmaster General, treating the service as if it were over the all land-grant route, imposed land-grant deduction for the whole distance, and during a period of twenty years made settlements accordingly. The railway company at the times of such settlements receipted in full to the United States therefor and at no time up to the filing of the suit ever formally demanded any additional compensation. An elaborate argument was made for the government, pressing the defenses of estoppel by acquiescence, mistake of law and accord and satisfaction, but the court sustained the claim of the railway company for the additional amount which it would have received (within the period of limitations) if it had been paid the full rate for the non-land-grant mileage, saying:

> "The contention of the defendants that the plaintiff company is estopped by its conduct in accepting the sums offered by the Government in payment of its claims for mail service without a protest, needs but little note. *Estoppel in pais* may be defined to be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Citing authorities.
>
> "It is needless to say that the record in this case contains nothing to show that the defendants were in any way misled to their injury by the conduct of the plaintiff. On the contrary, it appears that by the change in the route, so as to pass partly over the non-

> land-grant line, the Government paid less than it would have paid over the continuous land-grant road. Hence no change of position could possibly have been induced by the conduct of the plaintiff to the detriment of the defendants."

It will be observed that the court there held that even mutual mistake of law and receipts in full for a period of twenty years, were ineffectual to bar the claimant from the full compensation to which it was lawfully entitled under its contract.

And Pickley *vs.* U. S., 46 Ct. Cls., 77, hereinbefore cited, is also directly in point. There, as here, the claimant had an express contract, and the Comptroller of the Treasury had rendered a decision controlling the disbursing officer in respect of the amount payable. During the progress of the work payments were made on so-called vouchers in the shape of accounts in which were charged, against compensation earned, certain items of superintendence, inspection and measurement, which the court held were improper charges under the contract. To each of these so-called vouchers was appended a receipt and certificate in the following form: "Received at — this — from — the sum of — in full payment of the above account, which I certify to be correct." The court said (p. 91):

> "It is further contended by the Government that the receipts given by the claimant are an acquittance of any further demand under these contracts, and numerous authorities from our own courts are cited in support of this contention and an equal number from the same courts are cited in opposition. *At the time these receipts were given there was no dispute between the parties as to the amount due the claimant; the Comptroller of the Treasury had decided that the amount received was all that was due, and the paymaster could pay no more, and the claimant knew this. Quite likely he was led to believe that no greater sum was due him, but if so, as we decide, he*

*was mistaken. There was no settlement or accord or satisfaction between the parties, because there was nothing to settle and no difference between them to accord, and hence there could have been no consideration for receipting for a sum less than was actually due.* Under the authorities, as we understand them, we do not believe that the claimant is barred from recovering the balance which we find was honestly his due under the terms of the contract." (Citing authorities.)

And in Baldwin's case, 15 Ct. Cls., 297, at 303, the governing principles are well and comprehensively stated:

> "There is no principle of the common law better established and more generally recognized than that a payment, which is only in accordance with the terms of the contract and after its maturity, of a part of a liquidated and ascertained debt is no satisfaction in law of the whole indebtedness, and that a receipt in full given upon such part payment is *nudum pactum* as to the unpaid balance, and not binding upon the maker. (Citing authorities.)
>
> "There are some apparent, though not real, exceptions. To make the receipt of a part a discharge of the whole, there must be a new consideration, or a voluntary and well understood compromise of a disputable and disputed claim, by which each party yields something for the concession of the other; or an accord and satisfaction, by which a new contract is substituted, or a submission to arbitration; in each of which cases a consideration is expressed or implied. All the decisions upholding part payment as a discharge of the whole debt have turned upon one or the other of these apparent exceptions. The consideration may be slight, but it must be found to exist; as the payment of a note before its maturity, or by the promise of another party, or in chattels not required by the contract, or in any other manner differing from the original agreement, which may seem to be more beneficial to the payee. (Citing authorities.)

> "In the present case there was no new consideration for the discharge of the whole of the claimant's demand, no voluntary compromise, and no accord and satisfaction, from which a new consideration can be implied. The defendants' officers, having the power, arbitrarily reduced the liquidated debt due the claimant, by deducting from it a sum in set-off, which we have shown was not a legal and valid claim. At that time the money due the claimant had been long overdue, and the defendants did nothing more than to satisfy, to that extent, their long-matured obligations. It was a simple payment of part when the whole was due and ought to have been paid; nothing more. The yielding was all on one side, which renders the receipt *nudum pactum* as to the unpaid portion of the claim."

And on the question of the certification, in the face of the decisions of the Comptroller, of the so-called vouchers at land-grant rates instead of at the full rates, the case of Pennsylvania *vs.* U. S., 36 Ct. Cls., 507, is also in point. There (at page 527) the court said:

> "The doctrine of estoppel for failure to present—a doctrine not favored in the law—cannot be invoked by the party whose officers erroneously decided presentation to be a useless proceeding. Estoppel might arise against a party where his own conduct has caused another to act differently from a course which otherwise such person might pursue without reference to a statute of limitation. It cannot rest by mere silence upon a departmental ruling adverse to jurisdiction, with no additional rights acquired by a claim, and no injury done to the debtor in the meantime."

The cases on the subject of mistake of law, cited by the court below, involved payments made under mistake of law which it was sought to recover back, and have no application here. The claimants here are suing for balances due on

liquidated claims, withheld by reason of erroneous decisions of the Comptroller of the Treasury.

Nor is there here any question of laches. The claim is for causes of action arising within the period of limitation fixed by the Government and covering the whole period of the claimant's dealings with the Government.

And the cases on the subject of payment and acceptance, cited by the court below, are distinguishable from this case and from the cases we have cited.

Baird *vs.* U. S., 96 U. S., 430, was a case of unliquidated claim which had been presented to and audited by the Government and allowed for a sum less than the amount claimed. The claimants were informed of the allowance and the principles upon which the adjustment had been made. Three months later a draft was sent them for the amount found due, which was received and collected without objection. Chief Justice Waite, in the opening paragraph of the opinion, stated the distinguishing principles:

> "It is, no doubt, true that the payment by a debtor of a part of his *liquidated* debt is not a satisfaction of the whole, unless made and accepted upon some new consideration; but it is equally true, that, where the debt is unliquidated and the amount is uncertain, this rule does not apply. In such cases the question is, whether the payment was in fact made and accepted in satisfaction."

In the Railway Mail Service cases, 13 Ct. Cls., 199, improved mail facilities, in accordance with the act of 1873, had been installed on through trains between Philadelphia and Port Deposit, and between Philadelphia and Delmar, which, in the first instance, ran between Philadelphia and Chester, and, in the latter, between Philadelphia and Wilmington, over the main line of the Philadelphia, Wilmington and Baltimore Railroad. The Postmaster General continued to treat the Port Deposit route as terminating at

Chester, and the Delmar route as terminating at Wilmington, and all service between Philadelphia and Chester, and between Philadelphia and Wilmington, as embraced in the main line route, as theretofore. The companies accepted pay under this arrangement for a period, the company operating the Port Deposit route receiving from the main line company its ratable share of the main line pay between Philadelphia and Chester. Later they protested that the Port Deposit route should be regarded as terminating at Philadelphia and receive pay for the distance between Philadelphia and Chester at the same rate as between Chester and Port Deposit, and that the Delmar route should likewise be regarded as terminating at Philadelphia and receive pay for the distance between Wilmington and Philadelphia at the same rate as between Wilmington and Delmar. It will be seen that there was no contract between the parties for the full pay for the overlapping service on the main line, and that this branch of the case did not present the question of departure by the Postmaster General from the terms of an express contract in making payments, as in the later case of the Great Northern Railway Co., *supra*. It was held that the acceptance of the payments evidenced acquiescence in the Postmaster General's adjustment of the routes and the pay thereon and foreclosed claim for any additional compensation for the period prior to protest. When the protests were made such acquiescence was withdrawn and thereafter the case presented a changed aspect.

In the Central Pacific case, 28 Ct. Cls., 427, there was likewise no express contract. The Postmaster General had furnished certain postal employees written authority (termed a commission) declaring that railroads and other mail carriers were required to transport them free. The court held that the railroad company by transporting such employees without objection or claim for fare or compensation, must be held to have acquiesced in the understanding of the Postmaster General that such employees were transported free.

In each of these cases it was noticed that if the railroad companies had made timely protest or objection, the Postmaster General would have had the opportunity of protecting the interests of the Government by some other arrangement, the court saying in the Central Pacific case:

> "If the Post Office Department had been apprised in apt time of the adverse construction of the claimant it would have given it an opportunity of shaping its policy with reference to that construction; but, not having notice of such construction, it had a right to assume from the silence of the claimant that it acquiesced in that view of the railroad's obligation. * * * If a recovery can be had in this proceeding it must be on the basis of contract between the parties. Is it expressed or implied in the transaction that the defendants were to pay for the transportation of such agents? If it is not, then no obligation can arise."

As we have reiterated, we are here concerned with balances due upon diquidated claims under express contracts.

In U. S. *vs.* Garlinger, 169 U. S., 316, this court noticed (p. 320) that it was contended that, from the facts found by the Court of Claims, the law would imply a contract between the claimant and the United States, and that on the part of the United States it was contended that the regulation relied on by the claimant did not constitute an express contract of employment between the parties and that the facts negatived any notion of an implied contract to pay any additional beyond the statutory rate of three dollars per day. After deciding that the regulation invoked did not constitute an express contract nor sustain the claimant's contention of an implied contract, and thus disposing of the case, the court went on to consider the acquiescence of the claimant as also a ground for the same conclusion, holding that such acquiescence, in the absence of a contract, established the agreement of the parties.

The principle of these cases is stated in Hughes *vs.* U. S., 25 Ct. Cls., 472 (syllabus):

> "A receipt in full is but evidence, ordinarily, in the nature of an admission, liable to be explained or contradicted. But in cases, of implied contract, where the consideration is undetermined and the parties may agree upon the price, the receipt in full is an agreement to fix the value of the thing sold, and to consider the price so agreed upon as the full consideration of the contract.
>
> "A payment of a part of a debt is not payment of the whole; but in cases of implied contract there is no whole and no part until the amount is fixed by agreement of parties or the verdict of a jury."

And in *Finney vs. U. S.*, 32 Ct. Cls., 546, where it was said (pp. 554-5):

> "It is well-settled law that where a certain sum is due, payment of a part will not operate to satisfy the whole debt, even where a release of the entire sum is given, unless such payment be made and accepted upon some new consideration (*United States vs. Bostwick*, 94 U. S., 53, 67; *Fire Ins. Assn. vs. Wickham*, 141 U. S., 564, 577).
>
> "And to constitute a new consideration it must be so regarded by both parties, and this was the view of the court in *Philpot vs. Gruninger* (14 Wall., 570, 577), cited with approval in the case of *Fire Ins. Assn. vs. Wickham* (*supra*).
>
> "In this latter case it is further stated that 'to constitute a valid agreement there must be a meeting of the minds upon every feature and element of such agreement, of which the consideration is one.'
>
> "In respect of claims disputed by the Government, there is a class of cases holding in effect that, where a claimant voluntarily submits his claim for adjustment to the proper department or to a board appointed for that purpose, and the amount found due thereby is accepted and a receipt given therefor in full, that bars any further claim (*United States vs. Adams*, 7

Wall., 463, 479; *Mason vs. United States*, 17 Wall., 67; *Murphy vs. United States*, 104 U. S., 464).

"In the latter case, which was a claim for damages growing out of an alleged violation of a contract for excavating a pit for a dry dock, the court held that "acceptance by the claimant, without objection, of the amount allowed by the Secretary of the Navy in his adjustment of the account presented to him was equivalent to a final settlement and compromise of all the items of the present claim included in that account.'

"In the case at bar, however, the claim was not an unliquidated one, as the ascertainment of the amount due was a mere matter of computation, nor was it presented as a disputed claim, so far as it appears from the averments in the petition."

Respectfully submitted.

WILLIAM C. PRENTISS,
*Attorney for Appellant.*

[redacted]

# In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE WESTERN PACIFIC RAILROAD COMPANY, Appellant,
v.
THE UNITED STATES.
No. 136.

*APPEAL FROM THE COURT OF CLAIMS.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

This case is similar to the *Oregon-Washington Railroad & Navigation Company* v. *The United States*, No. 134, October Term, 1920, and was decided by the Court of Claims on the same day, May 5, 1919 (54 C. Cls. 131). It was decided upon the authority of *Denver & Rio Grande Railroad Company* v. *The United States* (54 C. Cls. 125), which in turn was decided upon authority of the *Oregon-Washington Railroad & Navigation Company* v. *The United States* (54 C. Cls. 131) and *Baltimore & Ohio Railroad Company* v. *The United States* (52 C. Cls. 468). The only differ-

ence between this case and those cases is that the present claimant was given judgment on certain items set out in its petition on which it had rendered bills for transportation of officers' baggage at full rates after the judgment of the Court of Claims in the *Chicago, Milwaukee & St. Paul Ry. Company case,* February 8, 1915 (50 C. Cls. 412). All of its bills prior to that date were rendered under circumstances in all respects similar to those rendered by the other railroads, and the claims for additional payments thereon were rejected by the Court of Claims for the same reasons.

The only additional argument advanced in this case to those advanced in the *Oregon-Washington Railroad & Navigation Company case* is that, as the shipments were not of property of the United States, the railroad was prohibited by law from receiving for its transportation anything less than the full published tariff rate.

## ARGUMENT.

### I.

The Government submits without repetition the argument on its behalf filed in No. 134, the *Oregon-Washington Railroad & Navigation Company* v. *The United States.* That argument applies with equal force to the facts in the present case.

In addition to the argument there advanced it is suggested that the *Western Pacific Railroad*

*Company*, the present claimant, like the *Oregon-Washington Railroad & Navigation Company*, is not a land-grant railroad, but is a party to the equalization agreement. As pointed out in the latter case, it is clear that at the time of becoming a party ~~of~~ to this agreement claimant knew that the shipments in question were being carried by all of the railroads at land-grant rates; that is, that such shipments were regarded by both the railroads and the Government as "property moved by the Quartermaster Corps, United States Army, and for which the United States Government is lawfully entitled to reduced rates over land-grant roads." (Equalization Agreement, Finding V, R. 10.) There can be no doubt as to the intention of the parties to this agreement.

The grant to the *Northern Pacific Railroad Company* (act of July 2, 1864, Chap. CCXVII, 13 Stat. 365, sec. 11, p. 370), provides:

> SEC. 11. *And be it further enacted*, That said Northern Pacific Railroad, or any part thereof, shall be a post route and a military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

A similar provision is contained in the grant to the Atlantic & Pacific Railroad Company (act of July 27, 1866, Chap. CCLXXVIII, 14 Stat. 292,

sec. 11, p. 297). There are other acts containing the same provision. See footnote to *United States* v. *Union Pacific Railroad Company* (249 U. S. 354).

It will be noted that the equalization agreement does not refer specifically to any one or class of land-grant acts. Therefore, in view of the uniform practice as to shipments of this character, and the fact that such shipments undoubtedly constitute "Government service," as used in the acts last referred to, the payment for which is expressly regulated and restricted by Congress in all the appropriation acts, is not the application of land-grant rates to such shipments fully covered by law and by the equalization agreement?

II.

As to the contention made that the Interstate Commerce act made any other than the published rate unlawful, and therefore that even if the claimant did agree to accept shipments at less than such rate, the difference between the rate which it agreed to accept and did accept and the published rate can now be recovered, section 22 of the Interstate Commerce act should be sufficient answer. This section (act of Feb. 4, 1887, chap. 105, 24 Stat. 387, as amended by the act of Mar. 2, 1889, chap. 382, 25 Stat. 855, 862) provides:

> SEC. 22. That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the

> United States, State, or municipal governments * * *.

Conference Ruling of the Interstate Commerce Commission No. 33, under date of February 3, 1908, is as follows:

> 33. *Reduced Rate Transportation for Federal, State, and Municipal Governments.*—Under section 22 of the act to regulate commerce, carriers may grant reduced rates for the transportation of property for the United States or for State or municipal governments, under arrangements made directly with such government and in which no contractor or other third person intervenes, without filing or posting the schedule of such rates with the commission. (See Rulings 36, 65, 208–e, 218, 244, and 311.)

(Conference Rulings Bulletin No. 6, Interstate Commerce Commission, Apr. 1, 1913.)

The other rulings referred to are all to the same effect. Neither the act nor the ruling is directed at property which is absolutely owned by the United States, but does specifically apply to property shipped by or for the United States. This fully covers the transportation furnished by claimant.

## CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

FRANK DAVIS, JR.,
*Assistant Attorney General.*

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# SUPREME COURT OF THE UNITED STATES.

No. 136.—October Term, 1920.

The Western Pacific Railroad Company, Appellant, vs. The United States. } Appeal from the Court of Claims.

[March 7, 1921.]

Mr. Justice McKenna delivered the opinion of the Court.

The basic proposition in this case, and most of its subsidiary considerations, are the same as in No. 134. It was argued at the same time as the latter case, and, as in that case, it is to recover amounts withheld by the accounting officers of the Government as land-grant deductions in settlements for transportation of the personal effects of Army officers.

It is asserted, however, that this action differs from No. 134 in that appellant, the Western Pacific Railroad Company was not completed and in operation until 1910 so that it is said "there is absent the element of previous course of dealings relied upon by the Government, and in that there was introduced in evidence" testimony to the effect that the first voucher presented for transportation service was for full tariff rates.

It is stated in the findings that the real claimants in the case are the receivers of the railroad but that its name is used to designate claimants for convenience, and that between June 10, 1910 and March 18, 1915, the railroad at the request of the United States, as shipper or consignor, received from other railroad companies at connecting points, on Government bills of lading, and transported over its lines, the effects and property of officers of the United States Army, changing stations under orders.

It further appears that from June 10, 1910 to March 18, 1915, the presentation of claims, character of vouchers accompanying the same, action thereon by the accounting officers of the Government, payment and receipt were the same as No. 134 except, it is found, that "settlements for charges on freight shipments on Government

bills of lading were in charge of one David A. McLean, head of the freight revising bureau in the office of the general auditor of the plaintiff (appellant) in San Francisco." And it is found "it was the practice of said McLean to revise the bills of lading and apply the rates applicable on the traffic at commercial rates, make the land-grant deduction and compute the freight charges at the net rate. After a month's bills of lading had been revised it was his practice to check up with the quartermaster's office and adjust differences, where there were any differences, as to the correct charges. He then caused the claims to be stated on the prescribed voucher form and after being signed they, with the bills of lading attached, were forwarded to the quartermaster for payment. It appears that to the best recollection of said McLean he stated the first of these claims, during this period, at commercial rates, but being informed by the quartermaster's office of the applicability of land-grant rates under the holding of the Comptroller and the established practice, he restated the claim on a land-grant basis. It further appears that he had just come to the service of the plaintiff; that he had had no experience in the rendering of bills for Government transportation; that as soon as he learned the custom with reference thereto he rendered bills for transportation of the character here involved at land-grant rates and continued to do so during all of said period. The rendering of the bill referred to at commercial rates, if in fact he so rendered it, was due to his ignorance of established practice and not because of any intention to question the propriety of the practice or to claim as a matter of right the application of commercial rates. It is not shown that at any time during this entire period he ever questioned the application of land-grant rates to such transportation or protested any settlements on that account, but all bills rendered by him, except as stated, were rendered at land-grant rates, and when so rendered he did not expect any further compensation and never expected compensation at other than land-grant rates until after the decision of the *Chicago, Milwaukee and St Paul* case by this court."*

It is further found that "the difference between the amounts claimed by the plaintiff and paid on account of said transportation during said period and the amount it would receive had it claimed and been paid full commercial rates without land-grant deduction

*50 Ct. Cls. 412.

is $5,760.89." The rulings of the accounting officers are detailed in the findings.

From March 18, 1915 to August 1, 1916, it is found that appellant was entitled "to payment at the regular tariff rates applicable." The Government accounting officers, notwithstanding, "issued warrants for net amounts after making land grant deductions." Against this appellant protested. The amounts deducted amounted to $851.78.

The conclusion of the court was, and its decision was, that appellant was entitled to judgment for the sum of $851.78 and that as to the other amounts its petition should be dismissed. For this the court gave as authority its decision in the *Denver and Rio Grande R. R. Co.* v. *United States*, No. 33391, decided on the same day.

The opinion in the latter case is set out in the record at page 16.

The argument in this case is the same as in No. 134, and rests on the same considerations. This case, as we have seen, was decided on the authority of *Denver and Rio Grande R. R. Co.* v. *United States* and the latter on the *R. & O. R. R. Co.* v. *United States*, 52 Ct. Cls. 468 and 134.

A contention, however, is made that was not made in No. 134, that is, that "under the Interstate Commerce Law the final carrier (appellant was final carrier of the transportation with which this case is concerned) is not only empowered to collect the through charge, but is burdened with the duty and obligation of collecting the full published tariff rate and is powerless to relieve or release a shipper or consignee from any part of the same."

The further contention is that within this obligation is the property in the pending case. The immediate answer is that Section 22 of the Interstate Commerce Act permits reduced rates to the United States and that by Conference Ruling of the Interstate Commerce Commission No. 33 of February 3, 1908, Section 22 is made applicable to property transported for the United States. The transportation in the present case was for the Government and in providing for it and paying for it the Government performed a governmental service.

*Judgment affirmed.*

Mr. Justice PITNEY and Mr. Justice CLARKE concur in the result.